SUPREME COURT OF THE UNITED STATES.

No. 127.

HEZEKIAH H. GEAR, APPELLANT.

vs.

THOMAS J. PARISH.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN.

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J. & G. S. GIDEON, printers.

Pleas before the supreme court of the Territory of Wisconsin, at a term thereof, begun and held at Madison, the seat of government of said territory, on the third Monday, to wit, on the 18th day of July, A. D. 1842. Present, the hon. Charles Dunn, chief justice, and the honorable David Irvin, and the honorable Andrew G. Miller, associate judges of said court.

Be it remembered, that heretofore, to wit, on the 18th day of July, A. D. 1842, came Hezekiah H. Gear, by Moses M. Strong, esq., his solicitor, and filed in the office of the clerk of the supreme court of said Territory of Wisconsin, the original papers in a certain suit in chancery, in the district court of the county of Iowa, sitting as a court of chancery, (a copy of which said original papers is hereinafter set forth) together with a transcript of the record of the proceedings in said district court, which said transcript is in the words and figures following, to wit:

Placita.

"Pleas before the hon. Charles Dunn, judge of the district court for Iowa county, Wisconsin Territory, at the court house in Mineral Point, on the 25th day of September, A. D. 1841, George Messersmith, esq., sheriff, Edward McSherry, clerk."

Memorandum.

"Be it remembered, that heretofore, to wit, *that* on the 4th day of September, A. D. 1838, came Thomas J. Parish, by Francis J. Dunn, esq., his solicitor, and before the clerk of the district court of said county, in his office, in Mineral Point, and filed with the said clerk, his certain bill of complaint in chancery, against Hezekiah H. Gear, which said bill is herewith transmitted to the supreme court of the Territory of Wisconsin.

"Thereupon the said Thomas J. Parish filed, in the clerk's office, a bond for a writ of injunction, according to the order of the judge, made at chambers. Upon the filing which bond, a writ of *of* subpœna, with injunction agreeably to prayer of the said complainant, which said bond, subpœna, and injunction are herewith transmitted to the supreme court aforesaid.

"And afterwards, to wit, at a term of said district court, begun and held at the court house, in Mineral Point, on the first Monday in the month of September, A. D. 1838, on the 14th day of the term, the same being the 19th day of the same month, the following was had in this cause, to wit:

"THOMAS J. PARISH, vs. HEZEKIAH H. GEAR. } Chancery and injunction.

Continuance.

"This day came the complainant by, and on motion of the complainant by, Francis J. Dunn, esq., his solicitor, this cause is continued until the next term of this court, and an alias writ is awarded. And afterwards, to wit, on the 15th day of February, A. D. 1839, came the said Hezekiah H. Gear, by Moses M. Strong, esq., his solicitor, before clerk of district court aforesaid, and filed with the said clerk his answer to complainant's bill of complaint herein.

"And afterwards, to wit, at a term of the said district court, begun and held at the court house, in Mineral Point, on the second Monday in the month of April, A. D. 1839, on the second day of the term, the following proceedings were had in this cause, to wit:

"THOMAS J. PARISH, vs. HEZEKIAH H. GEAR. } Chancery and injunction.

Motion to dissolve injunction.

"This day came the defendant, by Moses M. Strong, esq., his solicitor, and moved the court to dissolve the injunction herein, on bill and answer.

"And afterwards, to wit, at the same term of our said court, on the 17th day *day* of the term, the same being the 26th day of the said month of April, A. D. 1842, the following further proceedings were had in this cause, to wit:

"THOMAS J. PARISH, vs. HEZEKIAH H. GEAR. } Chancery and injunction.

Order that motion to dissolve be decided at chambers.

"This day came the parties aforesaid, by their solicitors; thereupon it is ordered by the court here, that the motion to dissolve the injunction herein be decided at chambers, and the opinion of the court thereon, with the papers, be returned to the clerk; that further proceedings and entries may be had and made in said cause. And afterwards, to wit, at the September term, A. D. 1842, of our said court, on the 17th day of the term, the same being the 25th day of September aforesaid, the following further proceedings were had in this cause, to wit:

"THOMAS J. PARISH, vs. HEZEKIAH H. GEAR. } Chancery and injunction.

Motion to dissolve, &c., overruled.

"This day came the parties aforesaid, by their solicitors, and the court being now sufficiently advised, of and concerning the motion of the defendant, entered herein at a previous term of this court, to dissolve the injunction heretofore granted herein, and dismiss the bill, on bill and answer, doth consider and order, that the said motion be overruled.

Motion to set down cause for hearing overruled.

" Thereupon, the complainant, by Dunn and Burnett, his solicitors, move the court to set down this cause for hearing, on bill and answer, and the court being now sufficiently advised, of and concerning the said motion, doth consider and order that the said motion be overruled.

Replication filed.

" Thereupon, the complainant, by his solicitors aforesaid, by leave of the court here had, filed his replication to the defendant's answer herein.

Continued.

" Thereupon, by consent of the parties aforesaid, and by leave of the court here had, this cause continued until the next term of this court.

" And afterwards, to wit, at a term of our said court, begun and held at the court house, in Mineral Point, on the second Monday in the month of April, A. D. 1841, on the 17th day of the term, the same being the 30th day of April aforesaid, the following further proceedings were had in this cause, to wit:

" THOMAS J. PARISH, vs HEZEKIAH H. GEAR. } Chancery and injunction.

Cause heard, submitted, and continued for opinion.

" This day this cause came on to be heard on the bill, answer, replication, and written testimony on file, and after reading the said bill, answer, and the depositions taken and exhibited as proofs in this cause, *and exhibited as proofs in this cause*, and after debate of the said matters by counsel, on both sides, it was submitted to the court and continued for opinion.

" And afterwards, to wit, at the September term of our said court, A.D. 1841, on the 18th, the same being on the 25th day of September, A. D. 1841, the following further proceedings were had in this cause, to wit:

" THOMAS J. PARISH, vs. HEZEKIAH H. GEAR. } Chancery and injunction.

Decree.

" This day came the parties aforesaid, and the court, being now sufficiently advised of and concerning the matters and things contained in the said complainant's bill of complaint, and the defendant's answer thereto, and the testimony submitted, doth now finally order, adjudge, and decree, that the injunction heretofore granted herein, enjoining the said Hezekiah H. Gear from collecting a certain judgment at law, against the said complainant, Thomas J. Parish, and particularly mentioned in his said bill of complaint, be perpetual; and the said Hezekiah H. Gear, his agents, attornies, and solicitors, and all others, are hereby for ever barred, enjoined and restrained from collecting, in any way or manner, the said judgment at law, in the said complainant's bill mentioned.

Judgment for costs.

"It is further ordered and adjudged, that the said complainant do have and recover against the said defendant, his costs and charges by him about his said suit in this behalf expended, and that he may have execution therefor.

Appeal.

"And afterwards, to wit, on the 22d day of October, A. D. 1841, the said Hezekiah H. Gear, defendant in the above mentioned suit, filed in the office of the clerk of the district court aforesaid, his petition and order of the judge of the said court, made at chambers, allowing an appeal from the said district court to the supreme court of the Territory aforesaid, together with his bond therefor, which petition, order thereon, and bond, are herewith transmitted to the said supreme court."

"TERRITORY OF WISCONSIN, *county of Iowa, ss:*

I, Edward McSherry, clerk of the district [court] of the United States within and for said county, do hereby certify, that the above is a true and correct transcript of the record and proceedings, in the cause above mentioned, as the same remain in my office.

In testimony whereof, I have hereunto set hand, and affixed the seal of said court at the clerk's office, in Mineral Point, this 16th day of July, A. D. 1842.

[L. S.]

(Signed,) EDWARD McSHERRY,
Clerk D. C. Iowa county.

Copy of original papers.

Bill.

"To the honorable Charles Dunn, chief justice of Wisconsin Territory, and presiding judge of the district court for Iowa county, Wisconsin Territory:

"Humbly complaining, sheweth unto your honor, your orator, Thomas J. Parish, of Grant county, Wisconsin Territory, that your orator became indebted, on an account, to one Hezekiah H. Gear, of Jo. Daviess county, in the State of Illinois, who, your orator prays, may be made defendant to this bill, in the sum, as your orator was informed by the said Hezekiah H. Gear, (defendant as above prayed) and as your orator believed, of three thousand and seven hundred dollars; and your orator, for securing the payment thereof, did agree, in order that it should embrace any contingency, as the said defendant as above prayed did inform your orator that there was an additional sum of three hundred dollars, or thereabouts, to mortgage to the said defendant, as above prayed, the lands, tenements, and premises, with their appurtenances, hereinafter referred to and mentioned; and accordingly your orator did execute to the defendant, as above prayed, one indenture of mortgage, bearing date on or about the fifth day of April, in the year of our Lord one thousand eight hundred and thirty-six, and which was made between your orator, of the one part, and the said defendant, as above prayed, of

the other part; and by the said indenture of mortgage, your orator, in consideration of the sum of four thousand two hundred dollars, (in order that that sum should embrace all contingencies,) to him in hand paid by the said defendant, as above prayed, did devise, release, &c., unto the said defendant, as above prayed, his executors, administrators, and assigns, all that, &c., to hold unto the said defendant, as above prayed, his executors, administrators, and assigns, in fee simple and forever, subject to a proviso or conditions of redemption, on payment of the said sum of four thousand two hundred dollars, or as much thereof as should be due to the said defendant on a final examination, four months after the date of the said indenture of mortgage, which would be on or about the fifth day of August, in the year of our Lord one thousand eight hundred and thirty-six, as in and by the said indenture of mortgage, in the custody of the said defendant, as above prayed, when produced, will more fully and at large appear; and your orator further sheweth unto your honor, that your orator, by William S. Hamilton, your orator's agent, hath paid the said full sum of four thousand two hundred dollars, with interest thereon, from the date of the said indenture of mortgage, in conformity with the proviso in the said indenture of mortgage specified, for which your orator has the receipt of the said defendant, as above prayed, and produces it here in court, (a copy of which is hereunto annexed, marked A.) But the said defendant, as above prayed, in order to distress your orator, hath failed to deliver up said mortgage indenture for cancelling, or re-assign the premises, and wholly fails and refuses so to do, according to the proviso thereof; and the said defendant, as above prayed, threatens, and says, that he will not deliver up said indenture of mortgage to be cancelled, or re-assign the premises, unless your orator pays him the additional sum of money, on a judgment obtained, as hereinafter stated, which sum of money, your orator avers, was a part, and embraced in the said sum of four thousand two hundred dollars, mortgaged money, but the judgment obtained for the same, your orator avers, was obtained by fraud, as hereinafter charged. Your orator well hoped, that the said defendant, as above prayed, would have delivered up unto your orator, the said indenture of mortgage, in conformity with the proviso in the said indenture of mortgage, or have reassigned the premises to your orator, as in justice and equity he ought to have done; and your orator would further represent unto your honor, that on or about the day of October, in the year of our Lord one thousand eight hundred and thirty-seven, your orator had notice from Joseph P. Hoge, attorney for the said defendant, as above prayed, that there was a balance due on the said account, for which the indenture of mortgage was given, of one thousand five hundred and sixty-two dollars and thirty-eight cents, and the said Joseph P. Hogue, attorney for the said defendant, as above prayed, requested your orator to confess judgment for the said sum of $1,562 38 cents, promising and guaranteeing to your orator, that if your orator would so do, that the said indenture of mortgage would be given up to be cancelled. Your orator having valuable premises incumbered by the said indenture of mort-

gage, part of which said premises your orator had, in good faith, sold, and received a valuable consideration for the same, and wishing to have the said premises free and unincumbered, to enable your orator to make good and sufficient deeds to the said premises so sold, did consent, without admitting that the said sum of $1,562 38 cents, so claimed, was just, being moved solely by the considerations above stated, on the promises of the said Joseph P. Hoge, attorney, &c., and on consultation with John Turner, your orator's attorney, your orator did confess judgment for the sum of $1,562 38 cents, at the October term of the district court for Iowa county, Wisconsin Territory, *anno domini* 1837. And your orator avers, and expressly charges, that the said sum of $1,562 38 cents, for which judgment was confessed, was part and parcel of the said mortgage money, and settled and arranged to the satisfaction of the said defendant, as above prayed, at the time when the said mortgage indenture was made; your orator being only moved to confess judgment for the said $1,562 38 cents, for the reasons above set forth, well hoped and believed, that on the confession of the said judgment for the said $1,562 38 cents, the said indenture of mortgage would be delivered up, to the end that it should be cancelled; but the said defendant, as above prayed, and his said attorney, has wholly neglected and refused to deliver up the said indenture of mortgage, or re-assign the premises, and the said defendant, as above prayed, to oppress, harrass, and ruin your orator, has caused execution to issue on the said judgment, so fraudulently obtained, and refuses to deliver up said indenture of mortgage to be cancelled, or re-assign the premises, until the money due on said judgment, so fraudulently obtained, is made by said execution; and your orator rests in great fear that his property will be taken in execution, and sacrificed, to his great injury and prejudice. The said defendant, as above prayed, or his attorney for him, to deliver unto your orator the said indenture of mortgage, or re-assign the premises to your orator, notwithstanding his said express promise, through his attorney, as in justice and equity he ought to have done, has wholly failed.

But now, so it is, may it please your honor, that the said defendant, as above prayed, combining and confederating himself with divers other persons, at present unknown to your orator, whose names, when discovered, your orator humbly prays may be inserted in this bill of complaint, with apt and proper words to charge them, he, the said defendant, as above prayed, in order to deprive and defeat your orator of the benefit of redeeming the said mortgaged premises, does pretend and give out in speech, that there is large sums due from your orator to him, the said defendant, as above prayed, on the said mortgage indenture, and that he will, and is advised, not to give up said mortgage indenture, until such time as the money is collected on the said judgment and execution, so fraudulently charged to have been obtained as above set forth; and at other times, the said defendant, &c., pretends that he has lost said mortgage indenture, whereas your orator charges, and the said defendant, &c., knows, the truth really is, that the sum for which your orator confessed judgment, was embraced in the said mortgage money, and that your ora-

tor has paid the said mortgage money in full, and that the said defendant, &c., has the said indenture of mortgage in his possession at the present time; and at other times, the said defendant, &c , says, that to procure said judgment, there was no promise made by his said attorney, and no fraud in procuring said judgment, and many other pretences unknown to your orator; the said defendant, &c., refuses to come to any manner of account with your orator, or to reconvey the said premises to your orator, and is proceeding at law, as fast as he can, to harrass your orator; all which *actings*, *doings*, and *pretences* of the said defendant, &c., and his confederates, are contrary to equity and good conscience, and tend to your orator's apparent wrong and injury. In tender consideration whereof, and forasmuch as your orator is altogether remediless in the premises, by the strict rules of the common law, and cannot have any discovery or relief touching the matters and things aforesaid, without the aid and assistance of this honorable court, where matters of account, hardship, fraud, and redemption of estate, are properly cognizable and relievable. To the end thereof, that the said defendant, &c., and his confederates, when discovered, may, upon his and their corporal oaths, (to the best of his and their knowledge, remembrance, and belief) true, perfect, and direct answers make to all and singular the matters and things aforesaid, as fully as if the same were herein again repeated, and they thereunto particularly interrogated. And more especially that the said defendant, &c., may set forth, whether your orator did not, and when, become indebted to him in the sum of $3,700 00 cents, and, to embrace any contingency, the liability was extended to $4,200 00 cents, and whether such mortgage indenture was not executed by your orator with such proviso for the payment of the said sum of $3,700 00, or 4,200 00 cents, to embrace any contingency, as above mentioned, or how otherwise. And whether your orator did not pay the said full sum of $4,200 00, with interest thereon, from the date of the said mortgage indenture, when it became due, under the proviso, to the said defendant, &c., or some person or persons for his use, and by his order or direction, or how otherwise. And that the said defendant, &c., may set forth what was due and owing to him on the said mortgage indenture, for principal and interest, and costs at law, if any, at the time of said payment, and that he may set forth why and for what reason he refuses to deliver up said indenture of mortgage to be cancelled, or re-assign the premises; and whether, at the time the said mortgage indenture was given, the settlement was not in full, and the $4,200 00 cts., designed to embrace any contingency; and whether your orator has had any account or dealings with him since the said indenture of mortgage was given, by which your orator could, in any manner, become indebted to him in any sum; and whether the said judgment was not obtained, as above stated, or how otherwise; and whether he has not ordered out execution on the said judgment, obtained as above; and whether he does not refuse to deliver up said mortgage indenture to be cancelled, or re-assign the premises, until such time as the said judgment and execution is satisfied, or how otherwise. And your orator prays that your honor may

have said mortgage indentured premises reconveyed or re-assigned, or said mortgage indenture cancelled, on paying the balance of the said mortgage money, if any, free and clear of all incumbrances, done by the said defendant, &c., or any persons claiming by, through, or under him.

"And that your honor will grant a perpetual injunction on said judgment, so fraudulently charged to have been obtained, and that an injunction be allowed forthwith on said judgment and execution and proceedings arising therefrom, until such time as the matters and things herein charged can be heard and determined, restraining all manner of proceedings therein, until otherwise ordered; and that your orator may have and receive such further and other relief in the said premises, as the nature of this, your orator's case, doth or may require, and as to your honor may seem meet. May it please your honor, the premises considered, to grant unto your orator the United States writ or writs of subpœna in chancery, to be directed to the said Hezekiah H. Gear, defendant, &c., and his confederates, when discovered; thereby commanding him, them, and every of them, at a certain day and year, and under a certain penalty, therein to be limited and mentioned, personally to be and appear before your honor, in this honorable court, then and there, upon his and their several corporal oaths, true and perfect answers to make to all and singular the premises herein mentioned; and further to stand and abide such order and decrée therein, as to your honor shall seem meet; and that a writ of injunction issue, staying all proceedings at law, on the matters and things herein set forth, and above complained of, and more particularly on said judgment and execution, directed to the sheriff of said Iowa county, and all others, enjoining them from proceeding on said judgment and execution, so fraudulently charged to have been obtained from your orator; and your orator will ever pray, &c."

(Signed,) THOS. J. PARISH.
TURNEY & DUNN,
Solicitors for complainant.

"TERRITORY OF WISCONSIN, *county of Iowa:*

"This day personally appeared before the undersigned, a justice of the peace in and for said county, Thomas J. Parish, whose signature appears to the above bill of complaint, and makes oath, that the matters and things set forth in said bill are true, to the best of his knowledge, remembrance, and belief; further saith not.

(Signed,) D. G. FENTON, *J. P.*

"*Copy of H. H. Gear's receipt.*

"Received, Aug. 1st, 1836, from W. S. Hamilton, a bill [of] exchange for four thousand two hundred and eighty-four dollars, on account Thos. Parish.

H. H. GEAR.

"TERRITORY OF WISCONSIN, *Iowa county, ss:*

"The clerk of the district court of Iowa county, in said Territory, is

hereby ordered and directed to issue subpœna in chancery, with injunction against the defendant, Hezekiah H. Gear, agreeably to the prayer of the within and above bill of complaint of Thomas J. Parish, provided that the injunction shall not be awarded until the said complainant shall enter into injunction bond, pursuant to law, to said defendant, with good and sufficient security, in the penal sum of three thousand dollars. The subpœna herein, to be dated on the first day of the present term, and returnable to the next term of said court.

" Given under my hand, this 3d day of September, A. D. 1838.

(Signed,) " CHAS. DUNN,
" *Chf. jus. and pres. in I. D. C. W. T.*

Bond.

" Know all men by these presents, that we, Thomas J. Parish and William J. Madden, of Iowa county, Wisconsin Territory, are held and firmly bound to Hezekiah H. Gear, of Jo. Daviess county, State of Illinois, in the sum of three thousand dollars, lawful money, to be paid to the said Hezekiah H. Gear, his attorneys, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, by himself, for and in the whole, our heirs, executors, and administrators, and every of them, firmly by these presents. Signed with our hands, and sealed with our seals, this 4th day of September, 1838. The condition of the above obligation is such, that whereas the above bounden Thomas J. Parish, has prayed for and obtained a writ of injunction from the chief justice of the Territory of Wisconsin, and presiding judge of the district court of the county of Iowa, restraining and enjoining the said Hezekiah H. Gear from proceeding to the collection of a judgment at law, obtained by him against the said Thomas J. Parish, in the said district court, at the October term thereof, in the year A. D. eighteen hundred and thirty-seven, for the sum of one thousand five hundred and sixty-two dollars and thirty-eight cents, in debt, until the said court shall make other order to the contrary. Now, if the said Thomas J. Parish shall pay, or cause to be paid, to the said Hezekiah H. Gear, all money and costs due, or to be due to him, in the said action at law, and also all such costs and damages as shall be awarded against the said complainant, in case the said injunction, herein granted, shall be dissolved, then this obligation to be void, otherwise to be in full force and virtue.

(Signed,) " THOS. J. PARISH, [L. S.]
" WM. J. MADDEN." [L. S.]

" Acknowledged before me, and approved of this 4th day of September, 1838.

(Signed,) EDWARD McSHERRY,
" *Clerk D. C. I. Co.*"

Subpœna.

TERRITORY OF WISCONSIN, *county of Iowa, ss:*

"District court, U. S., April term, 1839.

"The United States of America, to the sheriff of said county, greeting:

"We command you to summon Hezekiah H. Gear, if to be found in your county, personally to be and appear before the judge of our district court, to be holden in and for the said county and Territory, at the court house, in Mineral Point, on the second Monday in the month of April next, to answer the matters and things contained in a certain bill in chancery, exhibited against him by Thomas J. Parish, in our said court, on the chancery side thereof, and further to do and receive whatever the said court may then and there consider in this behalf, and this he shall in no wise omit. And have you then there this writ.

"Witness the hon. Charles Dunn, judge of our said court, at Mineral Point, this 3d day of September, A. D. 1838.

[L. S.] Attest, (Signed,) "EDWARD McSHERRY,
"*Clerk district court, I. county.*

"To the sheriff of Iowa county to execute.

"Served the within by reading and copy.

"So answers, JNO. BRACKEN,

"Nov. 8, 1838. *Under sheriff.*"

Writ of injunction.

"TERRITORY OF WISCONSIN, *county of Iowa, ss:*

"District court, U. S., April term, 1839.

"The United States of America, to Hezekiah H. Gear, his counsellors, attorneys, solicitors, the sheriff of the county of Iowa, and agents of the said Hezekiah H. Gear, greeting:

"Whereas, Thomas J. Parish has lately exhibited his bill of complaint to the judge of the district court, in and for the county and Territory aforesaid, on the chancery side thereof, against you, the said Hezekiah H. Gear, defendant, wherein, among other things, it is alleged that you unjustly prosecuted the said complainant at law, touching the matters and things therein stated and set forth.

"We, therefore, in consideration of the premises, do strictly enjoin and command you, the said Hezekiah H. Gear, and all and every the persons above mentioned, that you, and each of you, do absolutely and entirely desist from all further proceedings at law, against the said complainant, concerning any of the matters in the said bill complained of, until you and each of you shall appear to, and fully answer, the complainant's bill, and the said court make other order to the contrary. Hereof fail not, under the penalty of what the law directs.

"To the sheriff of said county to execute.

" Witness the hon. Charles Dunn, judge of our said court, at Mineral Point, in the said county, this 3d day of September, A. D. 1838.
[L. S.]

" Attest, (Signed,) EDWARD McSHERRY,
" *Clerk dist. court, Iowa county.*

" Served personally, on H. H. Gear, Nov. 8th, 1838.
" So answers, JNO. BRACKEN.
" *Under sheriff.*"

Answer.

" HEZEKIAH H. GEAR, defendant, ads.
" THOMAS J. PARISH, compl'nt. } In chancery.

" The answer of Hezekiah H. Gear, defendant to the bill of complaint of Thomas J. Parish, complainant.

" The defendant, now and at all time hereafter, saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant, answering, saith:

" That previous to the 5th day of April, A. D. 1836, as near as this defendant can recollect, but certainly previously to the execution of the mortgage deed mentioned in the orator's bill of complaint, the orator and this defendant had *had* extensive dealings, and this defendant had advanced to him at different times large sums of money, and had incurred liabilities, and the complainant proposed to this defendant to execute to him a mortgage of certain real estate to secure to him the payment of such sum as he should be indebted to him, to which this defendant acceded. There was no settlement or adjustment of accounts made between the complainant and this defendant, nor was the balance that was due to this defendant ascertained, but this defendant has subsequently ascertained that the sum that was then due to him from the complainant was about five thousand seven hundred dollars; the complainant thereupon executed to this defendant a mortgage deed, which is the same deed set forth in the complainant's bill of complaint, the date of which this defendant does not recollect, but presumes it is dated the same day and year as is set forth in the complainant's bill of complaint; this defendant does not recollect what lands were described in said deed, nor can he now give any particular description of said deed, as it is either lost or mislaid, and this defendant is wholly unable to find it, although he has made diligent search among all his papers; said deed was executed in Galena, Jo. Davis county, in the State of Illinois, but was never acknowledged or recorded; as near as this defendant can recollect, said deed was given to secure this defendant the payment of the sum of four thousand two hundred dollars, and such other sum as the complainant

might be indebted to this defendant; and the consideration expressed in the deed this defendant does not recollect, but presumes it was as stated in the complainant's bill of complaint."

"This defendant further answering, doth admit that William S. Hamilton did pay to him for the complainant, on the 1st day of August, A. D. 1836, the sum of four thousand two hundred and eighty-four dollars, by means of a bill of exchange for that sum, drawn by him on A. G. Sloo, &c., at four months, which sum this defendant applied to the credit of the complainant, and gave the receipt, a copy of which is annexed to the complainant's bill; but this defendant doth deny that said sum was intended to be paid, or was received by him, in full satisfaction of said mortgage, or of the debt due by said complainant to him; on the contrary, there was a balance then due to this defendant after said payment of more than fifteen hundred dollars; and this defendant doth deny that he refused at that time to deliver up said deed, or that said Hamilton requested him to do so."

"This defendant further answering doth admit, that in October, A. D. 1837, his attorney, Joseph P. Hoge, called upon the complainant to pay the balance which was due from him to the defendant, which was $1,562 38, and that the defendant confessed judgment for that sum at the time set forth in the complainant's bill; but this defendant doth deny that said judgment was in any wise obtained by fraud, either on the part of this defendant or said Hoge, his attorney, but was the free and voluntary act of the complainant. This defendant is informed, and does believe, that the said Hoge consented that said mortgage should be surrendered up to be cancelled, and he has been ready and willing that the same should be done, although he told Mr. Hoge at the time that he thought the mortgage ought not to be given up until the debt was paid, but he has never since that time been able to find said mortgage deed; but this defendant doth deny that said agreement of said Hoge was the consideration that induced said complainant to confess said judgment, but he was only induced to do so because it was an honest debt and ought to be paid, and because it was agreed that the execution on said judgment should be stayed for six months."

"This defendant further answering, states, that he has never had any wish or desire to molest, harrass, perplex, or injure the complainant by retaining said mortgage deed, but only to collect the money which was honestly due to him on said judgment, and it was for that purpose alone that he caused said execution to be issued, and that so far from refusing to reconvey said premises to the complainant, he did, on or about the 1st day of February, A. D. 1839, offer the complainant to execute to him any conveyance, release, or assurance of said premises which he or his attorney would draw up; and that, thereupon, Francis J. Dunn, the attorney of the complainant, drew up an entire and absolute release of all right, title, or claim, by virtue of said mortgage deed, which this defendant executed in due form of law to the entire satisfaction of the complainant and his attorney, as will more fully appear by reference to said conveyance in the possession of the complainant."

"And this defendant also admits, that about the same time the said complainant paid him two hundred and fifty dollars on said judgment, and he hereby offers and agrees, if the injunction upon his said execution shall be dissolved, to execute such other release or conveyance as to your honor shall seem meet."

"And this defendant denies all and all manner of unlawful combination and confederacy, wherewith he is by the said bill charged; without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct; and humbly prays to be herein dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained."

(Signed,) H. H. GEAR.

Sworn to and subscribed before me, this 15th day of February, A. D. 1839.

Attest: EDWARD McSHERRY,
Clerk D. C. I. Co.

Replication.

"The replication of Thomas J. Parish, complainant, to the answer of Hezekiah H. Gear, defendant."

"This repliant, saving and reserving to himself all and all manner of exceptions or advantages which may be had or taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto saith, that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer is very uncertain, evasive, and insufficient in the law to be replied unto by this repliant, without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things repliant is ready to aver, maintain, and prove, as this honorable court shall direct; and humbly prays, as in and by his said bill he hath already prayed."

(Signed) DUNN & BURNETT,
Solicitors for Complainant.

Mortgage.

"Know all men by these presents, that I, Thomas J. Parish, of the county Iowa, and Territory of Michigan, for and in consideration of the sum of four thousand two hundred dollars, to me in hand paid by Hezekiah H. Gear, of Galena, State of Illinois, the receipt whereof is hereby acknowledged, do, by these presents, give, grant, bargain, sell, and convey unto the said Hezekiah H. Gear, his heirs and assigns, and by these

presents have granted, bargained, sold, and conveyed, those certain pieces and parcels of land, to wit: the east half of the southwest quarter of section twenty-four, town. six north, range one west; and the east half of the northwest quarter of section twenty-five, township six north, range one west; and the southeast quarter of section thirty-three, town. seven north, range one east; and the west half of the northwest quarter of section thirty, town. six north, range one east; and the west half of the northeast quarter of section thirty, in township six north, range one east; also about five acres of land, whereon I am now preparing to put up a furnace, together with the furnace and buildings thereon, being a part of the northwest fraction of the southeast quarter, and the northeast fraction of the northwest quarter, of section one, town. eight north, range one west; together with all and singular the privileges and appurtenances thereunto belonging, or in any wise appertaining and belonging. To have and to hold the above granted premises to the said Hezekiah H. Gear, his heirs and assigns, to his and their use, benefit, and behoof forever; and the said Thomas J. Parish, for myself, my heirs, executors, and administrators, do covenant with the said Hezekiah H. Gear, his heirs and assigns, that I am lawfully seized in fee of the aforesaid premises, and that they are free from all incumbrance. That I have a good right to sell and convey the same to the said Hezekiah H. Gear, as aforesaid; and that I will, and my heirs, executors, and administrators, shall, warrant and defend the same to the said Hezekiah H. Gear, his heirs and assigns forever, against the lawful demands of all other persons; provided, nevertheless, that if the said Thomas J. Parish, his heirs, executors, or administrators, or assigns, shall pay or cause to be paid unto the said Hezekiah H. Gear, his executors, or administrators, or assigns, the said sum of four thousand two hundred dollars, with lawful interest, on or before the twenty-seventh day of August, then this deed, as also a certain obligation or bond bearing even date herewith, given by the said Thomas J. Parish, in the penalty of five thousand dollars, conditioned to pay the first mentioned sum with interest at the time aforesaid, shall both be void, otherwise shall remain absolute.

In testimony whereof, the said Thomas J. Parish hath hereunto set his hand and seal the twenty-seventh day of April, 1836.

(Signed) THOS. J. PARISH, [L. S.]

In presence of—

ROB. C. HASSON,
WILLIAM S. HAMILTON.

STATE OF ILLINOIS, *Jo. Daviess county, ss:*

I, Robert C. Hasson, notary public in and for said county, do certify, that Thomas J. Parish, whose name appears to the foregoing deed or mortgage of conveyance, is personally known to me to be the real person who signed the same, and who this day personally appeared before me, and acknowledged that he had signed and sealed the same as his free and voluntary act and deed, for the use and purposes therein expressed.

[L. S] Given under my hand and seal of office, at Galena, this 27th day of April, A. D. 1836.

(Signed) ROB. C. HASSON, *N. P.*

Bond.

"Know all men by these presents, that I, Thomas J. Parish, of the county of Iowa, and Territory of Michigan, am held and firmly bound unto Hezekiah H. Gear, of Galena, and State of Illinois, in the sum of five thousand dollars lawful money, which sum well and truly to pay, or cause to be paid, I bind myself, my heirs, executors and administrators, firmly by these presents, dated the 27th day of April, 1836.

"Now the condition of this obligation is such, that whereas the said Thomas J. Parish hath become indebted to the said Hezekiah H. Gear, the sum of four thousand two hundred dollars; and if the said Thomas J. Parish shall pay, or cause to be paid, the said sum of four thousand two hundred dollars, with interest, on or before the twenty-seventh day of August next, then this obligation to be void, otherwise to be and remain in full force and effect.

In testimony whereof, the said Thomas J. Parish hath hereunto set his hand and seal, the day and year above written.

(Signed,) THOS. J. PARISH. [L. S.]

Tests: WILLIAM S. HAMILTON.

Deposition.

"THOMAS J. PARISH,
vs.
HEZEKIAH H. GEAR.

In chancery, now pending in the district court for Iowa county, Wisconsin Territory, April term, A. D. 1841, on a bill for discovery with injunction on judgment at law.

The deposition of William S. Hamilton, on interrogatories propounded in the above case.

"Interrogatory 1st. Are you acquainted with the parties, complainant and defendant, in the above entitled suit?

"Answer. Yes.

Int. 2nd. Do you know any thing of the matters in dispute, between the said parties, as set forth in the complainant's bill of complaint? and if yea, state all you know about it.

"Ans. In the spring of 1836, when in Galena, I was present with Thomas J. Parish and Hezekiah H. Gear, at the closing up of their business; in fact, it was at my suggestion that they did so. At which time Mr. H. H. Gear presented his book, showing the account against Mr. Thos. J. Parish, which amounted to, in and about, the sum of three thousand dollars; but he Hezekiah H. Gear alledged, that there was other charges for freights upon certain furnace irons and brick; and perhaps some other small matters, and it was agreed, that Mr. Thos. J. Parish was to give Hezekiah Gear a mortgage upon property, to secure

Mr. Gear, and the parties left it to me to draw the mortgage, and put in so much property as I should deem good to make the debt secure; and according to the instruction of Mr. Gear, made in the presence of Mr. Parish, I was directed to take property to secure the sum of four thousand [dollars,] he, Mr. Gear alledging, that the addition of three hundred dollars would cover all the other claims not mentioned on the books of said Gear as exhibited at the time; but the said Parish did, at my instance, add the addition[al] sum of two hundred dollars, and the mortgage was then drawn, and executed, and acknowledged, for the sum of four thousand two hundred dollars, being at that time considered by all parties as amply sufficient to secure the amount due from Parish to Gear, and the said mortgage was delivered by me to Mr. Gear, in the presence of Mr. Parish; and afterwards, on or about the first day of August, 1836, I did pay the said Gear from Thomas Parish, the sum of four thousand two hundred and eighty-four dollars, by draft at four months, upon A. Sloo & Co.; the eighty-four dollars being for interest upon the draft, at which time I asked the said Gear for the mortgage above mentioned, which he declined *to* giving, stating that the amount paid by me did not cover the said Parish's account, and that he, Gear, wanted to settle the account, before he could give up the mortgage.

"Cross interrogatory to William D. Hamilton.

"1st. Was it understood between Gear and Parish, at the time the mortgage was given in the spring, 1836, that the mortgage was to be a full satisfaction of Parish's debt to Gear more or less, or was it understood between them, that Parish was to pay Gear what he owed him whenever he ascertained; was there, in fact, any settlement or adjustment of the accounts?

"Ans. At the time the mortgage was given, it was supposed that the amount specified in the mortgage would cover the debt, but that the balance, whatever it might be, whether in Parish or Gear's favor, was to be settled as just and correct.

"Signed, W. S. HAMILTON.

"I hereby certify, that the foregoing deposition of William S. Hamilton was taken on the 16th day of April, 1841, between the hours of eight and ten o'clock, P. M., of said day, before me in the manner therein shewn; the deposition was written by the deponent, and the deponent was duly sworn; is taken at the request of plaintiff, to be used in evidence in cause or suit named in the caption of the deposition, for the reason that the court in which the suit is pending, requires the same. M. M. Strong, esq. solicitor for defendant, was in attendance.

"Signed, JAMES S. BAWDEN, *J. P.*

"Cost $1 $^{0}_{0}$.

District court for Iowa county, Wisconsin Territory, April term, A. D. 1841.

THOMAS J. PARISH,
vs.
HEZEKIAH H. GEAR.

In chancery, for defeazance of mortgage premises, and perpetual injunction on a judgment at law.

Interrogatories propounded to John Turney, a witness herein examined, on the part of the complainant.

"Interrogatory 1st. Are you acquainted with the parties, complainant and defendant, in this suit?

"Answer. I am, and have been for some fifteen years past.

"Interrogatory 2d. Do you know *nothing* of the matters in controversy between the said parties in this suit? If so, state fully, and all you know of the same.

"Answer. After the suit at law mentioned in the complainant's bill was commenced, the complainant Parish, consulted me, as to the expediency of confessing a judgment; shewed me the receipt of defendant, Gear, in the bill mentioned, stated that he had made a sale of the premises in the mortgage mentioned, and has great anxiety to perfect the sale by making deeds of conveyance, and that J. P. Hoge, attorney for defendant in said suit, had given him a pledge, that, on confession of judgment, the said mortgage would be surrendered, and any error in the account sued on would be corrected by said Gear. I held a conversation with Mr. Hoge on the subject, in which I understood him to make pledges and promises as above stated; that is, that the mortgage should be given up, or cancelled, and any error in the account corrected. I understood that the sole object of Parish in confessing said judgment was, to enable him to make good conveyances of the mortgaged premises; and to effect that object, with a belief that the promises of Mr. Hoge would be performed in good faith, I advised Parish to confess the judgment. I know nothing about the accounts of the parties, further than as above stated.

"Signed, JOHN TURNEY.

"I hereby certify, that the foregoing deposition of John Turney was taken before me on the 17th day of April, 1841, between the hours of ten o'clock A. M., and two P. M., of said day; the manner of taking, was by F. J. Dunn, esq., attorney for plaintiff, writing the interrogatories, and the deponent writing his answers: was taken at the request of the plaintiff, to be used in evidence in the cause or suit named in the caption of the interrogatories or deposition, and the reason for taking, is, that the chancery court requires the same; the adverse party was not in attendance, but notice was waived.

"Signed, J. S. BAWDEN, *J. P.*"

Costs—62½.

Petition for appeal.

THOMAS J. PARISH, } vs. HEZEKIAH H. GEAR. } In chancery.

IOWA COUNTY, *W. T., October* 21, A. D. 1841.

To his honor Charles Dunn.

Hezekiah Gear feeling aggrieved by the decree of your honor in the above entitled cause, comes by M. M. Strong, and prays your honor to grant an appeal from the said decree of the district [court,] to Supreme Court, next to be holden at Madison.

M. M. STRONG,
Solicitor for ap't."

Appeal allowed.

TERRITORY OF WISCONSIN, *Iowa county and district, ss:*

"THOMAS J. PARISH, compl't, } vs. HEZEKIAH H. GEAR, def't. } In chancery.

An appeal is ordered to be entered in favor of defendant, in the above entitled cause, on the said defendant's giving bond and good security, in the usual form of appeal bonds, with the condition prescribed by law, in the penal sum of two hundred dollars. The clerk of the district court of said county of Iowa may approve the security.

Given under my hand and seal, this 21st day of October, A. D. 1841.

"Signed, CHARLES DUNN,
Judge 1st judicial dist. W. T."

Bond for appeal.

COUNTY OF IOWA, *Wisconsin Territory:*

"Know all men by these presents, that I, Hezekiah H. Gear, of Galena, in the county of Jo. Daviss, and State of Illinois, as principal, and we, John Bracken and Wm. Bennett, as sureties, acknowledge ourselves, jointly and severally, indebted to Thomas J. Parish, in the county of Grant, the sum of two hundred dollars, to be paid to the said Thomas J. Parish, his certain attorney, executors, administrators, or assigns, for which payment well and truly to be made, we jointly and severally bind ourselves, and each himself, our, and each of our heirs, executors and administrators, firmly by these presents.

"Signed with our hands, and sealed with our seals, this 22d day of October, A. D. 1841.

"The condition of the above obligation is such, that if the said Hezekiah H. Gear shall well and truly pay, satisfy and perform, the decree or final order of the Supreme Court, and all costs in case the decree or final order of the district court, made September term, A. D. 1841, in the county of Iowa, in a suit in chancery, wherein Thomas J. Parish was complainant, and Hezekiah H. Gear defendant, from which decree or final order of the district court the defendant appeal to the Supreme Court, then

the obligation is to be utterly null and void, otherwise to abide and remain in full force and virtue in law.

"Signed, H. H. GEAR, [SEAL.]
JOHN BRAKEN, [SEAL.]
WM. BENNETT.

"Signed, sealed, and delivered, in presence of—
C. ABBOTT,
JOS. TURTON.

"I approve of John Braken and Wm. Bennett, the security named in the above bond.

EDWARD McSHERRY,
Clerk D. C. I. Co."

And afterwards, to wit, at the aforesaid term of our said supreme court, begun and held at Madison, on the 18th day of July, A. D. 1842, the following further proceedings were had in this cause, to wit:

Motion to dismiss.

HEZEKIAH H. GEAR, appellant,
vs.
THOMAS J. PARISH, appellee.

This day came the appellee, by his attornies, Messrs. Dunn & Burnett, and moved the court to dismiss this cause for reasons, which motion having been argued, and the court not being now sufficiently advised of and concerning the same, took time to consider of its opinion.

And afterwards, to wit, at the same term of our said court, on the 28th day of July aforesaid, the following further proceedings were had in this cause, to wit:

Overruled.

HEZEKIAH H. GEAR, appellant,
ads.
THOMAS J. PARISH, appellee.

The court being now sufficiently advised of and concerning the motion of the appellee to dismiss this cause, it is ordered, that the said motion be overruled. Thereupon, the counsel for the appellee moved the court, that the appellant be ruled to file an assignment of errors, which motion having been argued, it was overruled by the court.

And afterwards, to wit, at the term aforesaid, on the 30th day of July, A. D. 1842, the following further proceedings were had in this cause, to wit:

Decree affirmed.

HEZEKIAH H. GEAR, appellant,
ads.
THOMAS J. PARISH, appellee.

The court being now sufficiently advised of and concerning the matters and things contained in the record in this cause, and the arguments

of counsel thereon having been heard, do decree and order, (his honor Judge Miller, dissenting,) that the decree of the district court of Iowa county be, and the same is hereby, affirmed with costs; and it is ordered, that the same be certified to said district court to be carried into execution.

And afterwards, to wit, on the 31st day of May, A. D. 1844, the following order of the chief justice of our said court, made at chambers, was filed in the clerk's office, and entered of record, to wit:

Order for citation.

THOMAS J. PARISH, complainant,
vs.
HEZEKIAH H. GEAR, defendant.

Appeal in chancery, to supreme court, W. T.

The clerk of the supreme court, of the Territory of Wisconsin, is hereby ordered to issue citation to Thomas J. Parish, complainant in the above case, notifying him of the appeal herein to the Supreme Court of the United States, directed to the sheriff of Iowa county.

Given under my hand, this 25th day of May, 1844.

Signed, CHAS. DUNN,
Chief Justice, S. C. W. T.

TERRITORY OF WISCONSIN, *supreme court, ss:*

I, Lafayette Kellogg, clerk of said court, do hereby certify, that the above and foregoing is a true copy of the transcript of the record in the above entitled cause, and of the original papers therein, as returned to this office, from the district court of Iowa county, in said Territory, together with a true transcript of the record and proceedings had thereon in this court at the July term, A. D. 1842, as appears of record.

In testimony whereof, I have hereunto set my hand and affixed the [SEAL.] seal of said court at Madison, this 12th day of June, in the year of our Lord one thousand eight hundred and forty-four.

LAFAYETTE KELLOGG,
Clerk supreme court, W. T.

UNITED STATES OF AMERICA, *Territory of Wisconsin:*

To Thomas J. Parish:

Whereas Hezekiah H. Gear has prayed for, and obtained, an appeal to the Supreme Court of the United States, from a decree of the supreme court of the Territory of Wisconsin, rendered by the said supreme court of the Territory of Wisconsin, at the term thereof, begun and held at Madison, the seat of government of said territory, on the third Monday of July, A. D. 1842, in a certain suit in chancery, in which you, the said Thomas J. Parish, was complainant, and the said Hezekiah H. Gear was defendant, and has filed his appeal bond in the office of the clerk of the supreme court of said territory, according to law, duly approved by the chief justice of said court, and has obtained an order from the said chief justice, at the time of approving said bond, for a citation, notifying you, the said Parish, of said appeal.

Now, therefore, you are hereby cited and admonished to be and appear before the Supreme Court of the United States, at a term thereof to be holden at the Capitol in the city of Washington, and District of Columbia, on the second Monday of January next, then and there further to prosecute your said bill of complaint against the said Hezekiah H. Gear, and to stand to, perform, and abide such order, direction, and decree, as the said Supreme Court of the United States may make therein. Hereof fail not.

To the United States marshal, for the Territory of Wisconsin to serve and return.

Witness the honorable Charles Dunn, chief justice of the supreme court of the Territory of Wisconsin, and the seal of said [SEAL.] court at Madison, this thirty-first day of May, in the year of our Lord one thousand eight hundred and forty-four.

LAFAYETTE KELLOGG,
Clerk supreme court, Wisconsin Terr'y.

By virtue of the within precept to me directed and delivered, I did, on the 7th day of June, 1844, cite the within named Thomas J. Parish, to appear at the time and place within mentioned, as by the said process he is required, by leaving an attested copy of said process with the *wife* of the said Thomas J. Parish, at his usual place of abode in this Territory, and to whom the nature of the said citation was duly explained.

So answers, DANIEL HUGANIN, *U. S. Marshal.*
By E. B. CARSON, *Deputy.*

Marshal's fees—serving process, $2 00.
120 miles travel, a 5 c. 6 00.

Know all men by these presents, that we, Hezekiah H. Gear, of the county of Jo Davis, and State of Illinois, and Moses M. Strong, of Iowa county, Wisconsin Territory, are held and firmly bound unto Thomas J. Parish, of the county of Grant, and Territory of Wisconsin, in the full and just sum of one thousand dollars, to be paid to the said Thomas J. Parish, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 25th day of May, in the year of our Lord one thousand eight hundred and forty-four.

Whereas, lately, at a term of the supreme court of the Territory of Wisconsin, sitting as a court of chancery, at a term thereof begun and held on the third Monday of July, A. D. 1842, in a suit depending in said court between the said Thomas J. Parish, complainant, and the said Hezekiah H. Gear, defendant, a decree was rendered against the said Hezekiah H. Gear; and the said Hezekiah H. Gear having obtained an appeal, and filed a copy thereof in the clerk's office of the said court, to reverse the decree in the aforesaid suit, and a citation directed to the said Thomas J. Parish, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of January next.

Now, the condition of the above obligation is such, that if the said Hezekiah H. Gear shall prosecute his appeal to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

Signed, H. H. GEAR, [SEAL.]
MOSES M. STRONG, [SEAL.]
[SEAL.]

Sealed and delivered in presence of—
R. BLAKELY.

Security approved by me, 25th May, 1844.
Signed, CHAS. DUNN,
Ch'f Judge S. C. W. T.

TERRITORY OF WISCONSIN, *supreme court, ss:*

I, La Fayette Kellogg, clerk of said court, do certify, that the within is a true copy of the appeal bond in the within entitled cause, on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the [SEAL.] seal of said court at Madison, this 31st day of May, A. D. 1844.

LA FAYETTE KELLOGG,
Clerk sup. court, Wis. Ter.

Filed, 1844.